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IMPAIRMENT ANALYSIS FOR
DEDICATED TRANSPORT

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PUBLIC UTILITY COMMISSION
OF TEXAS

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PUBLIC UTILITY COMMISSION
FILING CLERK

PRELIMINARY ORDER

This proceeding was established at the direction of the Public Utility Commission of Texas to determine whether competing carriers are not impaired without access to incumbent local exchange carriers' (LECs) unbundled dedicated transport pursuant to the Federal Communication Commission's (FCC) Triennial Review Order (TRO).¹

I. Background

In its TRO, the Federal Communications Commission (FCC) found on a national basis that competing carriers "are impaired without access to unbundled dark fiber transport,"² "are impaired on a route-specific basis without access to unbundled DS3 transport,"³ and "are impaired without access to DS1 capacity transport."⁴ The FCC also decided, however, to delegate authority to state commissions to declare that requesting carriers are not impaired if "facilities deployment is possible on a particular route,"⁵ and to identify "on which routes" carriers are not impaired "at a specific capacity" due to wholesale transport service from

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) (TRO).

² *Id.* ¶ 381.

³ *Id.* ¶ 386.

⁴ *Id.* ¶ 390.

⁵ *Id.* ¶ 405.

competing carriers.⁶ State commissions have nine months from the effective date of the TRO to conduct the initial review and may require an appropriate period to transition from any unbundled transport that the state finds should no longer be unbundled.⁷ The initial review is expected to evaluate the self-provisioning and wholesale triggers on a route-specific basis for specified levels of transport.⁸ If the self-provisioning trigger is met for any route for a specific level of transport, the initial review will evaluate whether there are significant barriers to entry that would foreclose deploying additional facilities.⁹ Further, if neither trigger is met, the initial review will evaluate additional factors to determine whether the market is suitable for “multiple, competitive supply.”¹⁰

The requirements in the TRO become effective on October 2, 2003, 30 days after publication¹¹ of the TRO in the *Federal Register*.¹² State commissions have only nine months from the effective date of the TRO to conduct the initial review.¹³ Accordingly, the Commission must complete certain tasks in this proceeding by July 2, 2004.

II. Procedural History

At its September 18, 2003 open meeting, the Commission addressed the TRO as it applies to an impairment analysis for unbundled dedicated transport and authorized Commission Staff to establish this docket. On October 15, 2003, the Commission administrative law judge

⁶ *Id.* ¶ 412.

⁷ *See Id.* ¶ 417.

⁸ *See Id.* ¶¶ 400, 401, 405, 412.

⁹ *See Id.* ¶ 411.

¹⁰ *See Id.* ¶ 410.

¹¹ *See* 68 Fed. Reg. 52276-52306 (Sept. 2, 2003) (to be codified at 47 C.F.R. pt. 51).

¹² *See* TRO ¶ 830.

¹³ *See Id.* ¶ 527.

(ALJ) in Order No. 1 established October 20, 2003 as the deadline for interested parties to intervene in this proceeding and also required intervenors to file a list of issues.¹⁴

Notices of intervention were filed by Covad Communications Company on October 17, 2003; and by Texas.Net, Inc.; Sage Telecom of Texas, L.P.; Southwestern Bell Telephone L.P. d/b/a SBC Texas; TEXALTEL; Verizon Southwest (Verizon); the Office of Public Utility Counsel (OPUC); United Telephone Company of Texas d/b/a/ Sprint, Central Telephone Company of Texas D/b/a/ Sprint, and Sprint Communications Company L.P. (collectively Sprint); El Paso Networks, LLC. (EPN); MCIMetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Texas, Inc. (Collectively MCI); the State of Texas; Western Communications, Inc. d/b/a Logix Communications; Allegiance Telecom, Inc.; Birch Telecom of Texas, LTD, LLP, Cbeyond Communications, LP, Focal Communications Corporation of Texas, Global Crossing Local Service, Inc., KMC Telecom III, LLC, XO Texas, Inc., and Xspedius Communications, LLC (collectively the CLEC Loop/Transport Coalition); AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Houston, Inc. (collectively AT&T); and McLeodUSA Telecommunications Services, Inc. on October 20, 2003.

Proposed issue lists were submitted by Covad, Texas.Net, Sage, SBC Texas, Verizon, Sprint, EPN, MCI, the State, Allegiance Telecom, the CLEC Loop/Transport Coalition, and AT&T.

III. Jurisdiction

In Order No. 1, the Commission ALJ ruled that the Commission is acting under the federal authority granted to the FCC pursuant to section 251(d)(2) of the Federal Communications Act that the FCC has delegated to the states to conduct analyses in accordance

¹⁴ See Order No. 1 at 3 (Oct. 15, 2003).

with federal guidelines.¹⁵ This market-specific analysis performed by this Commission will allow the FCC to properly determine the degree of unbundling of network elements required under section 251(d)(2) of the Act.¹⁶ The Commission adopts the ALJ's ruling that, in conducting this proceeding, the Commission is acting in part under federal authority delegated to it by the FCC. The Commission notes, however, that it has authority under state law to investigate competition in the telecommunications industry.¹⁷

IV. Nature of Proceeding

In delegating authority to the states to make certain impairment determinations on a route-by-route basis, the FCC specified factors that must be considered and certain parameters regarding the analyses leading to those determinations, set some deadlines, and established some procedures to challenge state action or inaction. Other than these areas, the FCC did not specify any procedures that must be followed.

In this proceeding, the Commission will investigate competition in specific telecommunications markets, and evaluate facts related to the competitiveness of specific markets within the framework specified by the FCC. This detailed analysis is necessary to properly determine the degree of unbundling of network elements required under federal law.¹⁸ Consequently, the Commission concludes that this investigatory proceeding is not a contested case or rulemaking as defined by the Texas Administrative Procedure Act.¹⁹ Further, the Commission is not acting under a petition for arbitration or a complaint regarding any existing interconnection agreement. Even though the results of this proceeding may ultimately appear in interconnection agreements, the Commission concludes that this proceeding is not an arbitration

¹⁵ See *Id.*

¹⁶ See TRO ¶¶ 184, 186-190.

¹⁷ See PURA §§ 52.054-055, 52.104, 52.205, 60.021-22.

¹⁸ *Id.* ¶¶ 184, 186-190.

¹⁹ See TEX. GOV'T CODE ANN. § 2001.003 (Vernon 2000).

of an interconnection agreement or a resolution of a post-interconnection dispute. Consequently, the Commission has some discretion in deciding how this proceeding should be conducted.

Due to the nature of the issues involved and the timelines faced under the TRO, the Commission concludes that this investigation should be conducted through a contested proceeding that generally follows the Commission's procedural rules for contested matters, but the Commission cannot conclusively determine at this time for this unique proceeding where it may deviate from these rules. The Commission does decide, however, that *ex parte* prohibitions shall apply, and that interested parties may conduct discovery and avail themselves of the Commission's authority to compel the attendance of witnesses and the production of documents.

Parties shall present factual information to the Commission by sworn evidence, and opposing parties will be allowed to challenge that evidence both by cross examination and by presenting controverting evidence. Parties to this proceeding will be required, however, to bring forth all information in their custody and control that would inform the Commission on issues it must address in this proceeding. In section V of this Order, the Commission identifies specific information for which parties must present evidence, either through testimony or by documents supported by appropriate testimony.

In addition, the Commission tentatively decides that the parties may make oral closing arguments in lieu of post-hearing briefs. Because the Commission is hearing this matter, no proposal for decision will be prepared and exceptions and replies are not necessary. Also, due to the nature of this proceeding, the timelines, and the opportunity for recourse to the FCC, motions for rehearing are not required. Motions for reconsideration may be allowed, or the Commission may issue preliminary findings and allow comment by the parties. The Commission or its ALJ will issue further orders regarding procedures to be followed in this matter.

V. Structure of this Proceeding

In this proceeding, the Commission will conduct impairment analyses for specifically identified point-to-point routes²⁰ under the self-provisioning trigger for dark fiber and DS3 transport²¹ and the wholesale competition trigger for dark fiber, DS3, and DS1 transport.²² For those routes where the self-provisioning trigger is met for a specific level of transport, the Commission will determine whether there are significant barriers to entry such that additional transport deployment is foreclosed even though this trigger is met.²³ If neither of the triggers is satisfied for a particular route for a specific level of transport, the Commission will analyze the potential deployment of competitive transport facilities using eight economic factors set by the FCC to determine whether a market is suitable for “multiple, competitive supply.”²⁴ The specifics of these analyses are discussed in some detail below.

A. Route Identification

In Order No. 1, intervenors were required to state whether they would argue that there are particular routes in Texas where competitive carriers are or are not impaired without unbundled access to dedicated transport facilities.²⁵ While there are various reasons why a party might allege non-impairment as to a given route, only two ILECs, SBC Texas and Verizon, have indicated an intention to do so. In Order No. 4, SBC Texas and Verizon were directed to identify the specific routes and transport levels for which each of them will assert no impairment, and the initial basis for their assertion of no impairment by November 12, 2003.²⁶

²⁰ See TRO ¶¶ 394-404.

²¹ See *Id.* ¶¶ 405-411.

²² See *Id.* ¶¶ 412-416.

²³ See *Id.* ¶ 411.

²⁴ *Id.* ¶ 410.

²⁵ Order No. 1 at 3.

²⁶ Order No. 4 at 2 (Oct. 31, 2003).

In this proceeding, for each route that an ILEC will challenge the FCC's national finding of no impairment, SBC Texas and Verizon shall present evidence to identify the route and the level of transport on the route, the "A" and "Z" switch and central office at each endpoint,²⁷ the competitive providers alleged to have deployed their own facilities on that route or to have offered wholesale transport services on that route, identify any collocation arrangements for transport that terminates at the identified switches or central offices, and whether the ILEC is affiliated with any such competitive providers.

Each competitive provider who participates in this proceeding shall present evidence for each route identified by an ILEC on whether that competitive provider has deployed its own transport facilities or has used competitive wholesale transport facilities. For each route, the competitive provider shall identify the route and level of transport, whether it is operationally ready to provide transport, the "A" and "Z" switch and central office located at each endpoint and whether there is a collocation arrangement for such endpoint, identify each intermediate endpoint not located at the "A" or "Z" switch or central office and the arrangement to terminate the transport at such intermediate endpoints, and identify any affiliates that also provide transport along that route.

For any route initially identified by an ILEC, any party may avail itself of discovery and present relevant information to assist the Commission in conducting the trigger analyses, potential deployment analysis, and exceptional impairment analysis described below.

B. Self-Provisioning Trigger and Competitive Wholesale Facilities Trigger

The Commission must use the two triggers identified by the FCC as the principal mechanism in evaluating whether requesting carriers are not impaired in a particular market. If either trigger is met, the Commission must find competing carriers are not impaired on that route, although when only the self-provisioning trigger is met, the Commission may petition the FCC for a waiver if it finds significant barriers to entry as discussed in section V.C of this Order.

²⁷ See *Id.* ¶ 401.

1. Self-Provisioning Trigger

The self-provisioning trigger is met when three or more unaffiliated competing carriers each have deployed transport facilities along a specific route.²⁸ Each competitive transport facility on a route counted to satisfy the self-provisioning trigger must terminate in a collocation arrangement in the incumbent LEC central office.²⁹ Competitive carriers identified to meet this trigger are not required to provide wholesale access to their transport networks.³⁰

For each route identified by SBC Texas or Verizon for which they assert no impairment due to self-provisioned transport, that party must show that the route meets the requirements for the self-provisioning trigger, but may rely upon evidence presented by another party to make this showing.

In addition to the route identification information required above, all parties shall identify any affiliates that provide transport on any identified route. Competing providers shall also present evidence to explain the basis for their right to use dark fiber, if any, whether they have attached their own optronics to activate the fiber, and whether they are operationally ready to use their facilities to provide dedicated DS3 transport.

2. Competitive Wholesale Facilities Trigger

The wholesale facilities trigger is met when two or more unaffiliated competing carriers offer wholesale transport service on a specific route.³¹ When a wholesale transport provider has obtained dark fiber from another carrier, including unbundled dark fiber from the incumbent LEC, and activates and operates that fiber with its own optronic equipment, that facility should

²⁸ *Id.* ¶ 405.

²⁹ *Id.* at 408.

³⁰ *Id.*

³¹ *Id.* ¶ 412.

be counted as a separate, unaffiliated facility.³² Competitive transport providers must be operationally ready and willing to provide the particular capacity transport on a wholesale basis along the specific route.³³ Additionally, the quality and terms of the competitive carriers' wholesale offerings need not include the full panoply of services offered by the incumbent LECs and the competitive transport must make the specific capacity transport services widely available.³⁴ Among the factors that the Commission should not consider in evaluating the wholesale trigger are the financial stability or well-being of the competitive transport providers, whether the incumbent LEC allows multi-vendor end-to-end testing of circuits and the economic feasibility of competitive offerings.³⁵

For each route identified by SBC Texas or Verizon for which they assert no impairment due to competitive wholesale transport, that party must show that the route meets the requirements for the competitive wholesale facilities trigger, but may rely upon evidence presented by another party to make this showing.

In addition to the route identification information required above, all parties shall identify any affiliates that provide transport on any identified route. Competing providers shall also present evidence to explain the basis for their right to use dark fiber, if any, whether they have attached their own optronics to activate the fiber, whether they are willing to provide dark fiber on a widely available basis along the route, and whether they are operationally ready to use their facilities to provide dedicated DS1 or DS3 transport or operationally ready to sell or lease dark fiber facilities for the provision of fiber-based transport along the particular route.

³² *Id.* at 414.

³³ *Id.* at 414.

³⁴ *Id.*

³⁵ *Id.* at 415.

C. Exceptional Sources of Impairment

If the self-provisioning trigger is met for any given route for a specific level of transport, parties will be allowed to show that significant barriers to entry exist on that route such that deploying additional facilities is foreclosed. If the Commission agrees that there are significant barriers that prevent further entry into that market, the Commission may petition the FCC for a waiver of the application of the self-provisioning trigger until the impairment to deployment identified by the Commission no longer exists.³⁶ The Commission tentatively concludes that it will not evaluate whether there are any barriers to entry for any route not identified by a competitive carrier.

The Commission concludes that competitive carriers have the self-interest and knowledge of such barriers that allow them to identify those routes that the Commission should evaluate for such impairment. Accordingly, competitive carriers shall identify those routes where they will assert that these significant barriers to entry exist, identify the barriers, and show why such barriers prevent further entry into the market.

D. Analysis of Potential Deployment

If neither trigger is met for a particular route at a specific level of transport, the Commission shall nonetheless consider the potential for self-deployment on those routes at that transport level. The Commission's potential deployment analysis will consider the following factors: "local engineering costs of building and utilizing transmission facilities; the cost of underground or aerial laying of fiber; the cost of equipment needed for transmission; installation and other necessary costs involved in setting up service; local topography such as hills and rivers; availability of reasonable access to rights-of-way; the availability or feasibility of alternative transmission technologies with similar quality and reliability; customer density or addressable market; and existing facilities-based competition."³⁷

³⁶ See *Id.* ¶ 411.

³⁷ See *Id.* ¶ 410, 417.

In a more general sense, the Commission must determine whether self-deployment is possible when all the operational and economic factors for a given route are considered. For example, a long-term moratorium on obtaining rights-of-way could preclude further deployment.³⁸ Further, whether expected revenues from deployed facilities would be sufficient to cover operating expenses, provide a recovery of invested costs in a reasonable amount of time, and provide a reasonable return on investment would be an important consideration to potential deployment by competitive providers.

Accordingly, parties shall present evidence for any specific route and transport level subject to this analysis on any of the factors discussed above that they have in their custody or control to assist the Commission in its evaluation. Competitive providers shall provide evidence that details their experiences regarding construction delays, obtaining collocation, obtaining rights-of-way and permits, and any other circumstances that operationally impair the deployment of transport facilities. Parties shall also present evidence regarding potential revenues likely to be available and all potential costs likely to be incurred by a competing carrier for a given transport route.

VI. Issues to Be Addressed

After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in the two phases of this docket.

1. For each route along which an ILEC asserts that requesting carriers are not impaired without access to dedicated DS3 transport or dark fiber transport due to a self-provisioning trigger, have three or more competing carriers, not affiliated with each other or the ILEC, including intermodal providers of service comparable in quality to that of the ILEC, met the following conditions?
 - a. For DS3 transport, has any competing provider deployed its own transport facilities, including transport facilities that use dark fiber facilities that the competing provider has obtained on a long-term, indefeasible-right of use basis that it has deployed by attaching its own optronics to activate the fiber. If so, is the competing provider

³⁸ See *Id.* ¶ 411.

operationally ready to use those transport facilities to provide dedicated DS3 transport?

- b. For dark-fiber transport, has any competing provider deployed its own dark fiber facilities, which may include dark-fiber facilities that the competing provider has obtained on a long-term, indefeasible-right of use basis?
 - c. Does each of these transport facilities terminate in a collocation arrangement at each end of the transport route that is located at an ILEC premises and in a similar arrangement at each end of the transport route that is not located at an ILEC premises?
 - d. What intermodal technology provides service comparable in quality to that of the ILEC for dedicated DS-1 transport and dark fiber transport?
2. If the self-provisioning trigger described in Issue 1 is met on a particular route at a specific level of transport, are there other significant barriers to entry that foreclose the deployment of additional facilities along such routes to justify finding of no impairment? If so, what are the particular routes and the associated barriers to entry, and why do these barriers preclude further deployment of additional facilities?
3. For each route along which an ILEC asserts that requesting carriers are not impaired without access to dedicated DS1 transport, dedicated DS3 transport, or dark fiber transport due to a competitive wholesale facilities trigger, have two or more competing providers, not affiliated with each other or the ILEC, including intermodal providers of service comparable in quality to that of the ILEC, met the following conditions?
 - a. For DS1, has any competing provider deployed its own transport facilities, including dark fiber facilities obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber? If so, is the competing carrier operationally ready to use these facilities to provide dedicated DS1 transport along the particular route? If so, is the competing carrier willing immediately to provide on a widely available basis dedicated DS1 transport along the particular route?
 - b. For DS3, has any competing provider deployed its own transport facilities, including dark fiber facilities obtained on an unbundled, leased, or purchased basis if it has attached its own optronics to activate the fiber? If so, is the competing carrier operationally ready to use these facilities to provide dedicated DS3 transport along the particular route? If so, is the competing carrier willing immediately to provide on a widely available basis dedicated DS3 transport along the particular route?
 - c. For dark fiber, has any competing provider deployed its own dark fiber, including dark fiber that it has obtained from an entity other than the ILEC? If so, is the competing carrier operationally ready to lease or sell those facilities for the provision of fiber-based transport along the particular route? If so, is the competing carrier

- willing immediately to provide on a widely available basis dark fiber along the particular route?
- d. For dark fiber, do competing providers have sufficient quantities of dark fiber available to satisfy current demand along a particular route?
 - e. Is each competing provider willing immediately to provide, on a widely available basis, dedicated DS1 transport, dedicated DS3 transport, or dark fiber transport along the particular route? What constitutes “a widely available basis?”
 - f. Does each of these transport facilities terminate in a collocation arrangement at each end of the transport route that is located at an ILEC premises and in a similar arrangement at each end of the transport route that is not located at an ILEC premises?
 - g. What intermodal technology provides service comparable in quality to that of the ILEC for dedicated DS-1 transport, dedicated DS-3 transport, and dark fiber transport?
 - h. Are requesting telecommunications carriers able to obtain reasonable and nondiscriminatory access to the competing provider’s facilities through a cross-connect to the competing provider’s collocation arrangement at each end of the transport route that is located at an ILEC premises and through a similar arrangement at each end of the transport route that is not located at an ILEC premises?
 - i. What constitutes reasonable and nondiscriminatory access to the competing provider’s collocation arrangement at each end of the transport route for dedicated DS-1 transport, for dedicated DS-3 transport, and for dark fiber transport?
4. Where neither of the triggers identified in Issues 1 or 2 have been satisfied on a particular route for DS3 or on a particular route for dark fiber, what facts and circumstances render such a route suitable for “multiple, competitive supply” and therefore justify a finding of no impairment on that route for dedicated DS3 or dark fiber transport? At what specific point does each or combination of the following factors suggest that a particular route is suitable for “multiple, competitive supply” of dedicated DS-3 or of dark fiber transport?
- a. local engineering costs of building and utilizing transmission facilities;
 - b. the cost of underground or aerial laying of fiber or copper;
 - c. the cost of equipment needed for transmission;
 - d. installation and other necessary costs involved in setting up service;
 - e. local topography such as hills and rivers;
 - f. availability of reasonable access to rights-of-way;

- g. availability or feasibility of alternative transmission technologies of similar quality or reliability along the particular route;
- h. customer density or addressable market; and
- i. existing facilities-based competition.

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by this Order, by the ALJ, or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed.

VII. Issues Not To Be Addressed

The Commission takes the position that the following issues need not be addressed in this proceeding for the reasons stated.

A transition plan to migrate the competitive LECs from unbundled transport to alternative transport facilities.

To the extent the Commission finds no impairment for dedicated DS1 transport, dedicated DS3 transport, or dark fiber transport on a particular route, the FCC expects the Commission to implement the transition of any competitive LECs from unbundled transport that the state finds should no longer be unbundled within an appropriate period of time. There is, however, a limited amount of time to address the numerous and diverse issues in this docket within the nine-month time period. The Commission decides that this issue can be managed in subsequent proceedings and should be deferred until a later date. Unbundled DS1, DS3, and dark fiber will remain available in all locations until the Commission has determined that unbundled transport at particular capacities on specific routes is no longer required and a transitional plan is implemented.

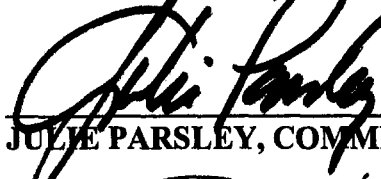
VIII. Effect of Preliminary Order

The Commission's discussion and conclusions in this Order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order at hearing. The ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to do so. Any ruling by the ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of an ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 10th day of November 2003.

PUBLIC UTILITY COMMISSION OF TEXAS


REBECCA KLEIN, CHAIRMAN


JULIE PARSLEY, COMMISSIONER


PAUL HUDSON, COMMISSIONER